

PLURAL LEGAL SYSTEMS IN MALAYSIA

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Introduction

In this paper it will be shown that the dynamic nature of interactions among plural legal systems is crucial in understanding law, human rights and the rule of law (ROL) in Malaysia. The first Part will ascertain an appropriate analytical framework capable of understanding the plurality of the Malaysian legal system. The first section of this Part will look at theories on identifying legal pluralism and the second section of the Part will look at theories on how plural legal fields interact. The second Part will apply the analytical framework obtained from the first Part to Malaysia. The first section of the second Part will apply the analytical framework outlined in the first section of the first Part to determine the sources of legal plurality in Malaysia. The second section of the second Part will apply the analytical framework mentioned in the second section of the first Part to analyze how the different legal spheres in Malaysia interact. It will then be briefly discussed how an understanding of the above is central to understanding law, human rights and the ROL in Malaysia. This approach of using legal pluralism theories to identify sources of legal plurality and how these sources interact in Malaysia has not been undertaken before and therefore is beneficial to those looking at how to harmonize these different normative spheres. Note that for the purposes of this paper 'State' and 'legal' are assumed to be related, except when that is the issue being discussed, although the extent to which this is true is debatable.

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Legal Pluralism Theories

First Generation Theories

First-generation theories on legal pluralism were characterized by two major understandings of what the term legal pluralism meant (Tamanaha 1993: 195; von Benda-Beckmann 2002: 33; Griffiths 1986: 1). The ‘weak’ view of legal pluralism (juristic version) is based on the idea that law is what the State says it is such that legal plurality occurs when the State orders different bodies of law for different groups in society (Walby 2007: 563). The more accepted ‘strong’ version of legal pluralism (social-science version) challenges this ideology of ‘legal centralism’ and states that not all law is State administered (Berman 2009: 230). Rather, legal pluralism is the co-existence of multiple legal orders, or ‘semi-autonomous fields’ (Moore 1973: 719; Griffiths 1986), in a social setting (Berman 2009: 230; Tamanaha 2008). Many postmodern co-option theories have originated from this idea of superimposed and interpenetrated legal spheres, which create a hybrid legal system (Chiba 1998; Shear 2008; Twining 2009; Mellissaris 2004).

However, this ideology of legal pluralism has two fundamental flaws. First, there is the analytical problem. The first aspect of the analytical problem is the lack of agreement on the underlying concept of law (Dupret 2007; von Benda-Beckmann 2002). Since there are many competing versions of what is meant by ‘law’, the assertion that law exists in plurality leaves us with a ‘plurality of legal pluralisms’ (Tamanaha 2000: 297). This leads to the second aspect of the analytical problem - the inability to distinguish law from social norms, which is problematic as classifying forms of social control as ‘law’ is misleading and does not allow for comparison (Tamanaha 2000: 297). Second, these theories often assigned a functional role to ‘law’ such as maintaining ‘order in society’, the ‘institutional enforcement of norms’ or ‘social control’. However, viewing law in functional terms causes theories to be applied too broadly, such that social regulation is encompassed in the definition, or too narrowly, by excluding everything else law does, what people think should qualify as law and presupposing that law plays a role in social order at all, thus ignoring the possibility that not all effects of law are functional in nature (Tamanaha 2008; Teubner 1996).

Second Generation Theories

The second-generation studies aimed to tackle these disadvantages and move past

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the theoretical problem of what constitutes 'law'. The theories of Santos, Teubner and Tamanaha were especially important in this respect although only the latter two will be discussed in regards to the current debate as to whether they have overcome the above-mentioned disadvantages (Santos 1989: 297-298; Teubner 1992: 14; Tamanaha 2000: 303). Teubner used autopoietic theory to argue that legal pluralism is not defined as a set of conflicting structures in a given social field but rather as diverse communicative processes or discourses that observe social action under the binary code of legal/illegal (Teubner 1996). By paying attention to the coding it will be possible to draw the line between *legal* discourses and other discourses that use a different codification to programme their regulatory operations.

Although this theory allows law to be distinguished from non-law, thus removing the first problem, its reliance on conventionalism to identify law does not allow this distinction to be made clearly in practice (Melissaris 2004: 74). By looking to the attitudes of the public to identify law the analysis turns on the semantics of legal and moral norms, which can vary significantly (Melissaris 2004: 74). For example, X may think a religious verse constitutes law however Y may think the verse does not. Is the more common view to be considered correct? Can conflicting accounts of what constitutes 'law' exist? Would that lead to a proliferation of laws? Further, it does not remove the second problem as the autopoietic nature introduces a problematic function-based relationship between law and society (Walby 2007: 562; Cotterrell 1995: 106; Teubner 1988). By presenting law as a self-structured closed circuit, i.e. law is what we say it is, the definition of law is unable to encapsulate the broader society (Walby 2007: 562; Cotterrell 1995: 106; Teubner 1988). Defining law as what an individual considers legal/illegal does not incorporate what the broader community perceives as legal or illegal or the influence other normative orders have on individuals. Thus, the function of law becomes purely what the individual perceives it to be. Despite these issues, the theory clearly improved on Teubner's attempt, which raised issues at the early definitional stage whereas here the problems seem to arise later in practice.

Tamanaha states that the key source of the problems mentioned above is that the concept of law is essentialist in nature such that law is assumed to be a fundamental category, which can be identified and described (Tamanaha 2000: 303). Tamanaha proposes that law should be seen as whatever we attach the label 'law' to such that legal pluralism exists when more than one kind of 'law' is recognized in a given social arena (Tamanaha 2000: 303). The concept of focusing on an individual's conception of law is similar to Teubner's model although

Tamanaha is able to move past the problems in Teubner's model. First, Tamanaha proposes that although any *group* within the social field could have their actions constitute law a minimum threshold to qualify is if 'sufficient people with sufficient conviction consider something to be 'law', and act pursuant to this belief' (Tamanaha 2000: 319). Thus, limitations are imposed to prevent a proliferation of law. Second, this recognition of individuals *as well as* groups removes the autopoietic problem of ignoring society. By allowing consideration of what a *group* considers to be law the theory allows considerations of group dynamics into the equation such as community influences on the group.

However, Tamanaha's model presents new problems. First, is what an individual considers law to be determined from their intentions or their actions (Dupret 2007)? Second, Tamanaha conceives of State law as a separate, autonomous and self-contained entity, which is ontologically different from other forms of social order (Shahar 2008: 423). This makes presuppositions about the relative autonomy of law and other normative orders such that they are seen as mutually exclusive. These assumptions lead Tamanaha to overemphasize the role of the State in constituting and defining legal orders (Shahar 2008: 423). For example, Tamanaha views the role of the State as providing governance and that the State is the only entity that does so (Mitchell 1977: 95-96). This emphasis on legal orderings has the consequence that the theory is unable to offer a nuanced view of non-legal normative orders that provide governance. Thus, the problem is not that this theory cannot distinguish between legal and non-legal orders; rather, that adequate attention is not being given to non-legal spheres. This is problematic because in countries like Malaysia, non-legal normative orders, such as religion, constitute a large part in the legal system. This introduces a theme that will run throughout the paper – the importance of non-State law in Malaysia due to the prominence of Islam and the existence of multiple ethnic subgroups.

Analytical Framework

It is argued that the two disadvantages inherent in Tamanaha's theory can be overcome. First, by using a praxiological approach one's behavior can be explained *through* their intentions (Dupret 2007). This approach states that to explain behavior one must not examine *external* factors such as social structures, cultures or schemes of behavior but rather *internal factors* such as the participants' own orientations, characterizations, and exhibited understandings (Dupret 2007). Thus, what is law is to be determined by the individual's personal characterizations and how this impacted on their behavior in a certain situation.

Second, it is argued that law should be seen as covering a continuum from State law to informal social control (Griffiths 1986). Within the realm of law, there is a continuum which stretches from State supported legal institutions to legal institutions that are not supported by the State. Thus, the boundaries between legal and non-legal normative orders, as well as between State law and non-State law, are blurred and open to individual construction. This characterization allows proper emphasis to be given to non-State normative orders as neither field is elevated or seen to have more emphasis.

Explaining the Interaction between Legal Spheres

First Generation Theories

During the 1960s and 1970s, classical legal pluralism saw plural fields as ‘parallel but autonomous’ (Merry 1988: 900). Research emphasized the dominant status of State law compared to other normative orders and thus its ability to shape these other systems (Merry 1988: 900; Burman and Harrell-Bond 1979). In the 1980s, studies showed limits to the capacity of State law to transform social life. This was often due to the special significance of normative orderings or the inapplicability of colonial laws in a foreign land (Merry 1988: 900; Burman and Harrell-Bond 1979). A common theme in these early models was the construction of normative orders as self-contained and hence separate from one another. This had the effect of creating boundaries around normative orders with a ‘space’ existing between them. Thus, researchers often analyzed interrelationships between the legal and the social from a systems theoretical perspective using structural coupling – a method which examines relationships between systems without meshing the boundaries of the various systems (Teubner 1992; Fix-Fierro 2005). The main disadvantage in these approaches was the lack of emphasis given to the interplay *between* systems. These early theories fail to recognize that State law can influence non-State systems, which can concurrently influence State law in a dialectic fashion. The focus on one-way influence rather than mutual influence did not accurately reflect reality.

Second Generation Studies

These theories emphasized the dialectic, mutually constitutive relation between normative orders (Merry 1988: 900). State law was seen to penetrate and

restructure other normative orders through symbols and direct coercion while, at the same time, non-State normative orders resisted penetration and used the symbolic capital of State law (Merry 1988: 900). Postmodern theories such as those of Berman and Fischer-Lescano and Teubner went beyond this concept of mutual influence and saw plural normative orders as participating in the same social field and meshed together (Berman 2010; Fischer-Lescano and Teubner 2004: 1003). Fitzpatrick adopted this idea of normative orders being meshed together. The focus here will be on his model and the current debate as to whether he was able to capture the nature of co-option in a theory. His concept of “integral plurality” states that both State and non-State semiautonomous social fields are constituted by their interrelations with one another (Fitzpatrick 1984: 127). For example, the family as a normative order is shaped by the State, but the State in turn is shaped by the family because each is constituted by the other (Fitzpatrick 1984: 127). Fitzpatrick argues that State legal orders tend both to converge with and maintain a distance from other normative orderings (Fitzpatrick 1984: 127). The State supports normative orderings that constitute itself and opposes normative orderings that contradict its basic tenants (Fitzpatrick 1984: 127). In other words, integral pluralism is part of a power and counter-power dialectic (Braithwaite and Drahos 2000: 228). This model removes the problem present in the first-generation theories. Instead of focusing merely on one-way influences, Fitzpatrick draws attention to *mutual influences* and *co-option*.

However, there are two problems with Fitzpatrick’s theory. First, the theory is unable to go beyond the first stage of interrelationship analysis and consider the individual constituents thus ignoring the factor of human agency. In discussing the dialectical relations between law and social forms, Fitzpatrick distinguishes law and talks about how despite outside influence it remains largely autonomous. This ignores the fact that it is through human interaction that law relates to other normative orders in the first place (Henry 2007: 305). In other words, structure and agency are correlated and Fitzpatrick’s attempt to understand the structure of normative orders needs to encompass an understanding of human agency. Second, despite Fitzpatrick’s emphasis on bi-directional influence, later theorists have interpreted his account as emphasizing the dominance of State law and its subversion at the margins rather than equal power relationships between normative orders (Shahar 2008: 417). This is problematic because in countries like Malaysia, informal normative orders, such as syariah law and customary law, are influential sectors of the legal system.

Henry builds on Fitzpatrick’s theory by proposing a model, in which normative orders interact with each other in a dialectic fashion such that both are vulnerable

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to incremental reformulations (Henry 2007: 305). He adds to Fitzpatrick's theory by suggesting that the relations between State law and other normative orders require attention to history, human agency, local contexts and culture (Henry 2007: 305). This is because there is a relationship not only between State law and normative orders but also between social action as human agency and its effect on both State law and normative orders (Henry 2007: 305). Humans are shaped by and shape the groups in which they are involved just as these groups are shaped by and shape the larger social structure. Note that this suggests that individual values, beliefs and interests are factors to be considered. This focus on human agency removes the first problem in Fitzpatrick's model. Further, the focus on the individual removes attention away from the State to non-State normative orders, thus removing the second problem in Fitzpatrick's model.

However, Henry's concept of adding the element of human agency within a theory focusing on interaction between normative orders has its disadvantages (Henry 2007: 305). Identifying different normative spheres is accompanied by a search to clearly demarcate and identify the boundaries of these normative systems and differentiate them from other spheres (Lange 2002). Although this allows for analytical precision, in practice it does not capture the complexity of interrelationships between normative orders. This is because maintaining strict boundaries between State and non-State law results in attention being taken away from *transitions* that occur between these normative orders. Note that it is not being suggested that all interrelations between spheres are transitions from the social to the normative or vice versa. Rather, it is being suggested that there are different *types* of relationships between spheres. Spheres can influence each other in a dialectic fashion, as argued by Fitzpatrick and Henry, but often spheres morph from one to the other (Lange 2002). For example, customs often *become* law. The Fitzpatrick and Henry approaches would not be able to analyze this situation, as there is no mutual influence involved. Thus, this point is not a disadvantage per se. Rather I recognize that Henry's model is incomplete and could be improved.

Analytical Framework

It will be argued that the incomplete nature of Henry's model can be fixed. Lange suggests that exploring transitions from social to State law or vice versa is necessary to properly understand legal pluralism (Lange 2002: 45). To illustrate this, Lange used the example of the IPPC Industrial Emissions Directive (Directive 2010/75/EU) on minimizing emissions. This directive required States to comply with the 'best available techniques' (BAT) in minimizing emissions. The

description of BAT in the IPPC Directive text suggests weak legal pluralism but the empirical data indicates that actors in the field when deciding on where their obligations lie did not operate with such clear bounded categories. Instead BAT was best understood as a transition from the social to the normative. Through a process of discussion, loose organizational networks such as working groups and interested parties created a definition of BAT that all parties agreed upon. This normative rule was then incorporated, or transitioned, into ‘law’ by adopting it as the BAT definition. This shows how an analysis focused on transitions may more adequately explain relationships between normative orders *in certain situations*. This notion of transitions is less concerned with structures, such as bounded categories, and more with transition as influenced by human agency. In this sense, it promotes the ideology of a correlation existing between structure and agency. In scenarios where a mutual influence exists, Henry’s theory is more appropriate.

Case-Study

Identification of Different Spheres in Malaysia

Malaysia’s plural legal system stems from its plural ethnic and religious society (Yaqin 1996). Below, the proposed analytical framework from section one of the first Part will be used to identify the major legal spheres in Malaysia’s legal system. Further, it will be shown how the proposed analytical framework was valuable in allowing these nuanced distinctions to be made and is better able to explain the situation on the ground in Malaysia compared to both first and second generation theories.

Official Law

Official law mandates different laws to apply for members of different ethnic and religious groups with further differentiations made within each category. First, there are laws that differ according to which ethnic group one belongs. For example, the Malaysian Federal Constitution 1957, Article 153, applies the principle of affirmative action to the *bumiputera* and, since 1971, the natives on Sabah and Sarawak. These principles have been incorporated into the 1971 National Economic Policy, 1991 National Development Policy and the 2000 National Vision Policy (Berma 2003). The practical effect has been to privilege the Malay population at the expense of other ethnic groups such as the Chinese and the Indians. However, note that a *further layer of differentiation* is created by the fact

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that the Orang Asli, the minority Indigenous groups of Peninsular Malaysia, are excluded from this *bumiputera* policy because they are not officially considered *bumiputera* under the Malaysian Federal Constitution 1957, Article 153. This is despite the fact that their settlement predates that of the Malays and they have the highest poverty rates in Malaysia (Berma 2003). This reinforces the theme of Islamic dominance in Malaysia, as the Orang Asli are animists rather than Muslims, although conversion rates to Islam have increased (Berma 2003). This may explain their lower 'status' in regard to Government support. Further, the fact that each new Policy purports to strengthen the capacity of the bumiputera to manage, operate and own their own businesses, and subsequently decrease Malay dependency (Berma 2003), yet has retained some type of positive discrimination in favor of the Malays suggests that although politics have caused changes to the bumiputera policy, an underlying thread of Islamic dominance has always remained.

Second, official law also mandates different law for different religious groups. For example, the Constitution provides for syariah law to apply to Muslims in certain civil law areas including family law, banking, polygamy and 'immoral' actions as stated in *Che Omar bin Che Soh v. PP*. Further, the Malaysian Federal Constitution 1957 in Articles 73-75 allocates power to the States to legislate in this area resulting in the differing codifications of Islamic norms, values and morals across State legislation and ordinances. For example, hudud legislation has been passed in certain States such as Kelantan although the extent to which is this legal and enforceable is in issue (Parenboom, Peterson and Chen 2006). The practical effect of this is a further layer of differentiation *between Muslims*. The conditions for polygamy, for example, are more stringent in some States meaning that the same act committed by two Muslims often result in different law and punishments applying simply because of geographical location (Bustaman-Ahmad 2009). Another example is the controversial *Family Law (Federal Territories) (Amendment) Bill 2005* which gave men increased power to freeze and claim a share of matrimonial assets from their wives' properties, to divorce their wives, and to contract polygamous marriages (Kommunikasi 2006). In effect this provides for different laws between Muslim men and women.

Third, official law also mandates different law for different ethnic or religious groups based on geographical location. An example of the former is how certain Federal Acts apply differently to Sabah and Sarawak on matters such as immigration, land and natural resource management. For example, in Peninsular Malaysia, the *National Land Code* governs laws relating to land whereas in Sabah and Sarawak, the main legislation is the *Sabah Land Ordinance* and *Sarawak Land*

Code respectively (Mohamed 2010). An example of the latter is the *Malay Reservations Enactment 1913 and 1930 (No. 18 of 1930)*, which protects lands from occupation by other races but only applies to Muslim Malaysians (Alwi Haji Hassan 1996). However, as above, this creates a further layer of differentiation *between Malaysians* as the relevant Reservation Act in each State defines ‘Malay’ differently. For example, the Malay Reservation Enactment 1913 defined a Malaysian as ‘a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion’ (Ali and Maidin 2011). Compare this to the Kelantan Malay Reservation Enactment which only states “...who speaks any Malayan language” omitting the other criteria (Ali and Maidin 2011). This results in vague distinctions being made about what constitutes being Malaysian and ultimately inconsistencies in those to whom land is offered.

Although first-generation theories would encompass everything mentioned above as ‘law’ they would not be able to distinguish between *types* of law such as legislation and judicial decisions or more importantly the above examples and non-official law shown below. Further, the first-generation theories would view the State law mentioned above as having a specified function as compared to customary law and normative regulation thus introducing the second problem inherent in first-generation theories. Tamanaha’s second-generation theory is able to make these distinctions but his emphasis on State law does not give adequate attention to non-State law. This is problematic because non-State law often exerts influence over State law as will be shown below. This inability to give proper attention to non-State law may also prevent identification or thorough analysis of the second layers of differentiation identified above (the Orang Asli exclusion from the *bumiputera* policy, the differentiation between Muslims within syariah law and the differentiation between Malaysians in regards to land law). This is because these differentiations occur as a result of non-State factors. For example, the Orang Asli are excluded from the *bumiputera* policy because of historical and political factors. Their status as non-Muslims led to a common belief that they could not be Malaysian. This led to customary practices in which they were often excluded from Government policies, especially during the slavery and assimilation period (Duncan 2008), subsequently leading to their current status under the Constitution. Thus, it is possible that as this situation results from the impact of customary law norms, a non-State normative sphere, it may not be given the attention it deserves. Note that law often stems from customary norms so this fear may be unwarranted. The suggested analytical framework solves this problem by perceiving law as a continuum, which draws attention to non-State spheres as well as State spheres on an equal basis. Consequently, it allows attention to be given to

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the different layers that make up the official law system.

Customary Law

Customary law is another source of pluralism between citizens based on ethnicity. Malaysia has customary law in relation to the Chinese, Peninsular Malaysians and natives on the island of Borneo. First, Chinese customary law has been recognized to differing degrees depending on the location in Malaysia (Strait Settlement States, Federated States, Unfederated States and Sabah/Sarawak) (Hooker 1980). For example, States in the Strait Settlement (Malacca and Penang) recognize Chinese law through common law principles in court such as private international law principles or 'natural justice' (Hooker 1980). In the Federated States, legislative amendments were enacted to override customary law. Unfederated States did not have local legislation and thus turned to the body of Chinese customary law accumulated in the Strait Settlements and Federated States jurisdiction (Perak Order in Council 1893). Thus, Chinese customary law was recognized on an *ad hoc* basis by courts with only minor legislative assistance in contrast to the approach taken in the Straits Settlements. In Sabah and Sarawak, direct legislative authority is required for Chinese customary law to be recognized (*Chan Bee Neo and ors. v Ee Siok Choo*).

Second, customary law of Malaysians has been recognized in Peninsular Malaysia with *adat perpatih* applying in Negeri Sembilan and Naning in Malacca and *adat temenggung* applying in all other states (Buxbaum 1968: 155). *Adat Perpatih* laws and customs are centered on a matrilineal philosophy whereas *Adat Temenggung* laws and customs are centered on a patrilineal philosophy.

Third, customary law has been recognized for the natives of Borneo (mainly Ibans and Dusuns) with Sabah and Sarawak native law existing across legislation, administrative codes and judicial decisions in the courts (Hooker 1980: 24). Note that unique customs exist for all tribes across Malaysia, for example the Sea-Dayak (Buxbaum 1968: 44). However Sabah and Sarawak will be the focus here. In Sabah, there exist three main pieces of legislation, the *Land Ordinance*,¹ the

¹ Originally North Borneo Ordinance No.9 of 1930 now cap. 68, Laws of North Borneo, 1953 as amended by the following: No 24 of 1954, 11 of 1956, 31 of 1956, 5 of 1960, 3 of 1962, 12 of 1962, 4 of 1968, 8 of 1971, 8 of 1972, 17 of 1972, as stated in Hooker 1980: 24.

Native Rice Cultivation Ordinance,² and the *Administration of Native and Small Estates Ordinance*.³ This is in addition to administrative codes often used as binding law in administrative offices and villages (Hooker 1980: 39). There are seven native law codes, called the Native Affairs Bulletins Nos. 1-7, each handling a different aspect of law (Hooker 1980: 39). Finally, there is case-law under the Native Court jurisdiction. In Sarawak there is also provision for local circumstances to apply alongside English law in legislation, administrative codes and common law.⁴ The two main legislative pieces are the *Land Code*,⁵ and the *Guardianship of Infants Ordinance*.⁶ Administrative codes fall into two classes: those that have been incorporated as subsidiary legislation,⁷ and those that have not but are published at official direction (Richards 1963, 1964). The Native Officers (Exercise of Powers) Order of 1957 also provides for the application of native law by a Native Officer or Sarawak Administrative Officer.⁸ This is in addition to case-law created under the Native Court jurisdiction and the three subsequent courts.

It is crucial to note that the above references to customary law are *State accepted* versions of customary law. ‘True’ adat exists in all of the above categories

² Originally Ordinance No. 1 of 1939, now Cap. 87, *Laws of North Borneo, 1953* as stated in Hooker 1980: 24.

³ Formerly North Borneo Ordinance No 1 of 1941 and as amended by Ordinance No. 3 of 1953, now Cap.1, *Laws of North Borneo, 1953* amended by Ordinance No.8 of 1961 as stated in Hooker 1980: 24.

⁴ Sarawak Application of Laws Ordinance – formerly Ordinance No. 27 of 1949, now Cap.2, *Revised Laws of Sarawak, 1958*, amended by GNS 179/59, GNS. 66/60 and FLN 179/65.

⁵ Cap. 81, *Revised Laws of Sarawak, 1958*, replacing the Land Ordinance Cap. 27, Laws of 1948. Dealings in Land (Validation) Ordinance No.19/1955. Recent amendments to the 1958 edition are Ordinance No. 2/1974, and L.N. 29/74, and L.N. 30/74, as stated in Hooker 1980.

⁶ Formerly Ordinance No.23/1953, now Cap. 93, *Revised Laws of Sarawak, 1958* as stated in Hooker 1980.

⁷ Sections 3, 4 and 5 of the Native Customary Laws Ordinance, Cap. 51, *Revised Laws of Sarawak, 1958*.

⁸ G.N. 115 of 1957; reproduced in vol. VII, *Revised Laws of Sarawak, 1958*: 1, as stated in Hooker 198: 45.

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although only examples of the latter two will be given. First, in relation to Malaysian customary law, Bin Mat (1985) states that the term *adat*, when used in legal codes such as the 'Malay Digest', refers to a concept influenced by Islam (cited in Hooker 1980: 38). Thus, if one studied a legal code that contained Malay *adat* law, it was often not pure Malay customary law but the surviving tradition of Malay *adat* law assimilated with Islamic legal thought (Bin Mat 1985). However, the traditional, non-Islamic influenced *adat* is still practiced in some parts of Malaysia. For example, much of the *Perpateh* legal system (*adat perpateh*) was codified in a series of compilations during the period when Islam first penetrated Malaysia (Bin Mat 1985). However, certain customs were not codified and thus were free from Islamic influence. For example, certain matrilineal customs are still practiced today in Negeri Sembilan. The Customary Tenure Enactment of 1935, Section 3(vi), states that the heir of a deceased male registered owner of customary land should be his nearest female relative who is also a member of his tribe or clan (Bin Mat 1985: 87). This is in conflict with principles of Islamic law on inheritance, which requires property transfers to be implemented according to a male lineage, thus suggesting this *adat* is free from Islamic influence (Bin Mat 1985: 88). This conclusion is supported by Rahman who states that the British selected and preserved, without changing, what they conceived as the more 'civilized' and 'advanced' traits of Malay law which was attributed largely to *adat perpateh* (Rahman 2006: 35).

Second, in relation to customary law on Borneo, prior to the Brooke administration the indigenous communities in Sarawak governed themselves through *adat* (Siang Lim 1986). Over time *adat* was changed due to colonial interpretation and codification and now exists as 'customary law'. However, 'true' *adat* is practiced in remote parts of Malaysia (Siang Lim 1986). For example, the Sarawak *Land Code* mentioned above classifies land into three classes (Hooker 1980: 65). However this is in opposition to Native principles of tenure causing the *Land Code* to be evaded in certain parts of Sarawak (Hooker 1980: 22-23). Another example is Sabah where legislation covers only three topics (Hooker 1980: 31). Thus, large parts of private law are not subject to legislative intervention or administrative governance and are often found in 'true' custom (Hooker 1980: 31). Thus, it is possible that all areas not covered by the legislation or administrative codes mentioned above are handled by 'true' *adat*. Although evading the law does not equal complying with 'true' *adat* there is reason to think in most circumstances this is the case. For example, the *Land Code 1958*, acknowledged the rights of native communities to live on their land (access rights); however it was ambiguous about 'ownership' rights (Cooke 2006). The practical result of this was that native customary land was taken to be

‘crown land’ and Dayak landowners were considered mere ‘licensees’ on ‘State’ or ‘crown’ land (Cooke 2006). However, most native communities were unaware of these announcements and continued to create new settlements in line with adat as ‘illegal squatters’ (Cooke 2006). The 2000 amendments to the *Land Code*, which included ss5(2)(f) being deleted, which was the main section used by natives to acquire native land, suggests that evading the law to retain customary land rights may become more common.

As above, although first-generation theories may correctly identify the above as law, they would have been unable to make subtle distinctions such as distinguishing customary law from ‘true’ adat or distinguishing customary law from State law. Although Tamanaha’s second-generation theory is able to make these distinctions, it presents other problems. Tamanaha’s emphasis on State law may prevent a deeper analysis of non-State normative orders such as true adat which plays a significant role for the Chinese, Peninsular Malaysians and natives of Borneo as shown above. Each system of customary law identified above appears to have a ‘truer’ version that has not been influenced by colonial powers or Islam and is still practiced in Malaysia. The suggested analytical framework solves these problems. By perceiving law as a continuum, attention is drawn to non-State spheres, such as ‘true’ adat, as well as ‘State approved’ customary law allowing for adequate attention to be given to both. Note that the analytical framework is clearly supportive of the theme mentioned above as it allows identification of the non-State law in Malaysia.

Normative Regulation

Normative regulation is another source of pluralism based on religion or ethnicity. This can most obviously be seen in the example of syariah law being implemented outside the terms of what is prescribed in State legislation. The first level of differentiation is by geographical location. One example is the enforcement of private justice through hudud laws in States controlled by PAS (the Islamic Party of Malaysia), especially Kelantan, a State known for its conservative stance on Islam (Suaram 2003, 2008). The State Legislature of Kelantan ratified the Kelantan Hudud Bill in November 1993 although it cannot be officially implemented without the Federal Government making constitutional changes as the Bill currently exceeds the Kelantan Parliament’s jurisdiction. Although hudud laws have never officially been enforced there have been numerous examples of its unofficial enforcement. An example is given below of a girl and boy being caned.

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Further, PAS-controlled States such as Kelantan are in general known for being stricter in enforcing syariah law, disregarding the role of hudud laws, resulting in different regulation of citizens in these States. For example, not wearing a headscarf at work in Kota Baru, Kelantan has often led to punishment, as has the display of “indecent” haircuts (Suaram 2003). Female genital mutilation is still practiced in rural parts of Malaysia despite this practice being illegal (Rashid, Patil and Valimalar 2010), and live performances of music are often prohibited in Kelantan. In 2002, following the State of Terengganu, the Kelantan State government banned live performances of rock and pop, with or without women performers, including some traditional performances (Suaram 2003: 167-168). This was followed by a Kuala Terengganu Municipal Council announcement that there would be a ban against all women, including non-Muslims, from public singing and dancing (Suaram 2003: 167-168).

The second level of differentiation is personal interpretation, which differs by individuals. The primary source of Islamic law is the Quran and the hadith (sayings or actions of Muhammad or his companions) of the Prophet but in addition there exists secondary sources derived from human reasoning and interpretation. One example is the existence of legislation, for example the Administration of Islamic Law Enactment 1971 in Selangor (Bin Mat 1985: 165), which allocate powers to the *mufti* (a jurist who interprets Muslim law) to issue, amend or revoke *fatwas* (rulings on points of Islamic law) (Suaram 2008: 113-114). These Islamic authorities have influence over the administration of religious matters such as what is considered to be ‘true’ Islam (Kamali 2000; Suaram 2008: 114). Often ‘deviationist’ sects are blacklisted and rehabilitated and ‘moral policing raids’ are implemented (Suaram 2003: 117). Further, syariah *criminal* laws are often implemented by members of the community throughout religious parts of the country although not as consistently or as widespread a fashion as secular criminal laws (Suaram 2003: 116). In fact, religious departments and municipality officers often conduct moral policing operations to punish ‘indecent behavior’ (Suaram 2008: 117). In February 2005 the Malacca chief minister officially launched a moral squad established through the controversial 4B Youth movement to spy on wayward Muslim youths and eventually young people of all religions. Due to the vague wording and broad formulation of the syariah Criminal Offences Enactment these ‘moral raids’ and arrests often result in the manipulation and abuse of legislation by enforcement officers.⁹ This is because fatwas, which regulate on issues of morality and aspects of a person’s private life such as those

⁹ This is evidenced by the case of Ayu as stated in Petaling 2008: 117.

on woman dressing like men and the practice of yoga, are difficult to enforce without values impacting one's judgment which subsequently leads to selective prosecution (Suaram 2008: 118). Note that individual values are often determined by geographical location. This can be seen through the example of hudud laws mentioned above. Muftis in PAS-controlled States are likely to exert more stringent control due to the fundamentalist attitude that exists there.

Examples were given above of how normative regulation of syariah law differs. It should be mentioned that normative regulation can differ on the basis of other characteristics besides religion, such as ethnicity. One example is the implementation of native law in Sabah and Sarawak through administrative codes, which are informally regulated by community officials (Hooker 1980). Another example is in Sarawak, where adat at the local level is administered by the Penghuli or chiefs, who receive a salary from the State (Suaram 2008: 199). This suggests that personal values of the chiefs, and State officials exert an influence on how adat is enforced. This is also an example of the second layer of differentiation identified above – that is, that personal values impact the implementation of normative regulation.

As above, although first-generation theories may have been able to identify normative regulation as law it would not have been able to distinguish this type of law from customary law and State law, rather categorizing all the above as 'law'. Tamanaha's second-generation theory is able to make these distinctions although it is unable to make more subtle distinctions. First, the large role of individuals in implementing syariah law or adat means their behavior and intentions may be incongruent thus making it difficult to determine what they consider 'law'. For example, if X punished a woman for not wearing a headscarf but did not believe this to be right, would his actions or intentions be considered 'law'? What if differing opinions or actions existed within a group? Which actions or intentions would be taken to represent the group? Second, Tamanaha does not emphasize non-State normative orders adequately, which is problematic as normative regulation is a non-State entity. Thus, although the role of non-State normative orders would have been picked up, it may not have been given the attention it deserves.

Further, Tamanaha's theory is unable to identify the second layer of differentiation identified above. This is because individuals, such as the mufti, are often not aware that their personal values are dictating what constitutes law. If they do not realize that the 'law' in this scenario is being dictated by their personal values then the basic premise of Tamanaha's theory is not satisfied and it is possible that this

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normative sphere may not even be identified let alone given proper attention. The suggested analytical framework moves past these disadvantages. First, a praxiological approach would suggest looking at the intention behind an act such that the first scenario above would not constitute law as the 'internal' requirement is not met. Where there are differing views within a group, then theoretically a 'law' does not exist as the praxiological approach is individualistic in nature. However, from a practical and objective perspective, it would appear for all intents and purposes to be a legislative requirement. Second, by perceiving law as a continuum, the emphasis is appropriately shifted to consider both legal and non-legal normative orders.

Analysis of the Interaction between Spheres

Below the proposed analytical framework from section two of the first Part will be used to analyze how the different spheres *interact*. Further, it will be shown how the proposed analytical framework was valuable in teasing out the interaction and power relations between these normative orders such that it is better able to explain the situation on the ground in Malaysia compared to both first and second generation theories.

Dialectic Relationships

There are relationships between State-law and non-State law, which can best be characterized as a relationship of mutual influence. Note that the mutual interaction does not have to be equally powerful – one sphere may be more powerful than the other. This can be seen in the first scenario where the State law sphere has more of an influence on non-State law. For example, often State law (official law) steps into the boundary of non-State law (customary law) and modifies it due to the State's coercive power. This is evident from the Brooke administration where customary law in Malaysia became transformed through codification and interpretation to align with European ideology (Hooker 1980). Further, recent difficulties in establishing native custom has led courts in Sabah to only recognize custom if it is stated in legislation (Hooker 1980; *Ahmad v Jenidiah*). However, the mutual influence is evident as customary law can also have an influence on State law. For example, in *Gulis v Malon*, the failure to invite the wife's relatives to a wedding was held to be a breach of custom and thus gave rise to payment of compensation (*Gulis v Malon*). Similarly, rulings in relation to a breach of promise to marry are often handed down (*Ahmad v Jenidiah*). This frequent recognition of

custom often amounts to precedent and thus constitutes ‘law’.

An example of State law (official law) co-opting elements from a non-State sphere (normative regulation) can be seen from the fact that despite the existence of criminal legislation, as mentioned above, unofficial implementation of hudud law occurs in Kelantan. For example, in March 2003, two students of opposite sex aged 14 and 17 were publicly caned for talking to each other by self-appointed vigilantes (Suaram 2008). These two men were later punished. This shows the primacy of State law, as the men were eventually punished, although it also shows the influence that normative regulation has on the State, as similar occurrences often happen without being reported.

The second scenario is where non-State law has more of an influence on State law. For example, when syariah law (non-State law) affects and imposes restrictions on non-Muslims thus ignoring their guaranteed rights (official law). This can be seen through the ‘Islamification’ phase in Malaysia’s history characterized by deference to Islam in cases involving non-converting spouses, forbidding proselytizing to Muslims although not restricting those who attempt to convert non-Muslims and finally allowing certain council laws to directly affect non-Muslims (Suaram 2008). For example, in 2002 a non-Muslim Chinese food seller was fined because a Muslim woman bought food from his shop during fasting (Suaram 2008: 105). The application of syariah law to non-Muslims is even more evident in PAS-controlled States (Suaram 2008: 107). In 2003, the Terengganu State government announced a special aid fund collected from revenues attached to ‘sinful’ activities such as pig farming, pawn broking and alcohol sales from non-Muslims in the State (Suaram 2008: 107). Similarly, the use of the word ‘Allah’ by the *Herald Sun* and other texts was prohibited, questioning the freedom of worship principle (Suaram 2008: 199). This can most clearly be seen in the apostasy cases that are explained in more detail below (Suaram 2008: 112-113). However, it is important to note the subtle influence non-Muslims have on syariah law thus highlighting the dialectic nature of this relationship. For example, the United Malays National Organization (UMNO), the party in power, has conventionally taken a less stringent approach to Islam to ensure the ‘protection’ of non-Muslims’ rights in order to win their vote (Suaram 2003: 99). For example, they refuse to support the enforcement of hudud laws (Suaram 2003: 99). Similarly, Malaysia has repeatedly stated that it is a secular State despite what occurs on the ground suggesting otherwise. This reiterates the theme of the dominance of Islam in Malaysia.

An example of non-State law (customary law) co-opting State law (official law) can be seen through the example mentioned above of the matrilineal system in

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Negeri Sembilan. A conflict arises in the case of jointly acquired property in terms of which judicial system should apply. The adat system seems to have prevailed despite Islamic law existing in judicial decisions, opinions and State Council Minutes (reported in Bin Mat 1985: 99). However, Islamic law still exerts some influence on this matrilineal focused adat. It appears that the provisions regarding jointly acquired property are often applied in accordance with the principles of adat law although Muslim jurists attempt to justify this as valid on the Islamic principle of partnership property (Bin Mat 1985: 99).

The third scenario is where both State and non-State spheres influence each other in a 'cyclic' fashion. For example, Chinese customary law is recognized in Sabah and Sarawak through the Native Courts (Buxbaum 1968). The criteria upon which the court determines Chinese 'customary law' however seems to be by analyzing the customs of Chinese people living in Borneo at the time of the decision (Buxbaum 1968: 97). Thus, the courts have upheld a divorce application from a woman, which is clearly contradictory to Chinese customary law that gives the wife no opportunity for divorce (Buxbaum 1968: 107). This shows that current society affects the court's interpretation of customary law and thus they co-opt non-State elements. Further, customary law then adapts to the court decisions, which suggests the non-State law is co-opting elements from the State (Hooker 1986, 1999: 43). However, customary law has also significantly influenced State-law. Due to the prominence of Chinese customary law, Sabah and Sarawak have introduced legislation on the topic to gradually integrate Chinese customs into the contemporary legal system (Hooker 1986, 1999: 43).

Two further points need to be made. First, there are other types of interactions and only the more crucial types are being discussed here. For example, it is possible for State and non-State spheres to *accommodate* each other. The Malacca laws (Undang-Undang Melaka) is an example of how Islamic elements are apparent in the laws of Malaysia but also how indigenous features have been retained. For example, sections 1-23.1 mention both adat penalties and Islamic penalties for breaking the law (Bin Mat 1985: 40). Similarly, some Temenggung legal digests contain both adat and Islamic law with sections 1-13 comprising the former and 24-66 comprising the latter (Bin Mat 1985: 41-45). It appears that Islam often accommodates customary laws so long as it is in consonance with its essential doctrine and principles.

Second, note that while the above discussion was concerned with interactions *between* fields it is possible for interactions to occur *within* fields. For example, within the normative sphere of official law, two sources that can interact with each

other include legislation and judicial decisions. Similarly, within the field of customary law there are administrative codes and adat that can interact with each other and within the field of normative regulation there are religious norms that can interact with each other. An example of the first is the controversy over freedom of religion. Although discussed in more detail later it is sufficient to say that although Article 11 in the Constitution guarantees freedom of religion, the courts have not extended this right to Muslims wishing to denounce Islam. An example of the latter is demonstrated by a dress code requirement brought to public attention in 2003, which made it mandatory for all graduating students to wear traditional Islamic clothing even if they were not Muslims (Suaram 2008: 104). However, the aim here is not to begin an analysis of private international law principles in Malaysia (i.e. what happens when there is a conflict of laws). Rather, the point is to analyze different interaction patterns i.e. an existing conflict is not assumed.

The first-generation theories would have been unable to pick up the mutual interactions between State law, customary law and normative regulation in the above examples. However, they might have only have picked up on the more powerful sphere influencing the less powerful sphere. Similarly, Fitzpatrick's theory fails to draw adequate attention to non-State spheres, which is problematic as in all the examples above, the non-State sphere influenced the State sphere in some way. In the case of non-official syariah law, it *significantly* influenced State law. The interaction of sources *within* a non-State sphere would also not have been given adequate attention or the accommodation of two non-State spheres. Further, Fitzpatrick's failure to emphasize human agency is problematic as non-State spheres often operate through individuals. For example, enforcement officers often implement non-official syariah law against non-Muslims in religious parts of Malaysia. Similarly, adat is through village elders or chiefs.

The suggested analytical framework allows the above distinctions to be made. Henry's emphasis on human agency recognizes the influence individuals have on normative orders that consequently influence other normative orders. An example mentioned above was how group sects in Sabah and Sarawak practice 'true' adat. The strength of this practice and their individual values will dictate how strong their semi-autonomous field is. The stronger their semi-autonomous field the more likely it will be seen as 'custom' and be recognized by the courts. This status of 'law' will then impact on other spheres such as how State legislation is to be interpreted in relation to the recognized adat (Henry 2007). This emphasis on the individual and incremental reformulations allows adequate attention to non-State entities as desired. In doing so, the 'integral plurality' between customary law and

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State law and how they constitute each other is highlighted (Fitzpatrick 1984). Further, accommodation of normative spheres and interactions within normative spheres are recognized. Note that the analytical framework is clearly supportive of the theme mentioned above as it allows identification and an analysis of the interaction of non-State law in Malaysia.

Transitions

This part outlines relationships between State-law and non-State law that can best be characterized as a *transition* from one to the other. The fourth scenario is the transition from non-State to State law although note that other permutations are possible. Above it was shown that an example of normative regulation was the enforcement of hudud laws in certain parts of Malaysia (Suaram 2008: 67). One aspect of this is that Muslims who tried to renounce their faith were severely punished (Suaram 2008: 67). With the rise of liberalization and international human rights in the non-rural areas of Malaysia, citizens have started challenging this norm. Although the freedom of religion appears in Article 11 of the Federal Constitution, in practice this does not appear to apply to those who are born Muslim (*Siti Fatimah Tan Abdulla*). Disputes of this nature have been held to come under the jurisdiction of syariah courts despite Article 11 and syariah courts have rigorously only allowed renunciation on limited grounds due to s160(2) of the Constitution – for example only by people who were not born Muslim and recently converted to Islam (Parenboom 2006; *Lina Joy v Majlis Agama Islam Wilayah & Anor.*). This supports the theme that although Malaysia has a thick rule of law ideology on paper, in practice they are a thin rule of law country. Thus, what was once a social norm now appears to have transitioned into customary law or a less enforceable type of State law. Further, this customary norm is likely to get stronger in the future. With the increasing politicization of Islam, both the UMNO and PAS have amplified their stance on Islam to show the majority Muslim population that they are the ‘true’ Islam representing party (Suaram 2008: 67). Thus, it is possible that in the future this customary law may become ‘official’ State law.

This norm has been enforced strictly suggesting that the non-syariah sphere has had virtually no influence on the matter except to the extent mentioned above. Thus, it appears to constitute a transition from the social to the normative rather than a relationship of mutual influence between bounded normative orders. The increasing politicization of Islam accompanied by the desire to stop Malaysia from being westernized has caused the ‘Islamification’ of Malaysia (Camrouz 1996).

The theme mentioned above can again be seen here. One consequence evident on a grass roots level is that citizens have become more religious and enforcement of Islam has been more concrete and widespread (Suaram 2008; Lee 2006). Examples include the Syariah Criminal Offenses (*Hudud and Qisas*) Enactment 2002 being passed in Terengannu and the loss of support of UMNO in favor of the religious political party PAS (Parenboom 2006). Over time, the reiteration of this strict approach to Islam caused what was once normative regulation to transition into customary law. This interaction could only be identified through the concept of transitions. If an analytical framework based purely on mutual influence had been used this interaction may have been glossed over due to the fact that there *is no* mutual influence in this scenario.

Another example is Malaysian forest laws, which have transitioned from adat or customary law to normative regulation. Before colonization, Borneo was governed by adat in relation to land and resources. For example, unclaimed land was considered either open access or community land (Peluso and Vandergeest 2001). After colonization, the State took control of forest areas. Customary rights became the most limited subset of adat practices that were recognized, defined, changed and codified by colonial authorities (Peluso and Vandergeest 2001). Once certain customary practices became represented in the law as “customary rights”, residual customary practices became crimes (Peluso and Vandergeest 2001). Peluso and Vandergeest found that the colonial states that pushed territorialization of political forests the furthest were Java and the Malay States such that fewer adat were codified as customary rights and more adat was criminalized (Peluso and Vandergeest 2001: 787). The opposite situation occurred in Borneo. In practice, this meant that practicing true ‘adat’ was often a crime. Figures show that more forest crimes per capita were reported in Java and the Malay States than any other part of the region including Dutch Borneo (Peluso and Vandergeest 2001: 787). This is in line with the fact that more adat was criminalized in Java and Malaysia than Dutch Borneo. This suggests that even though true ‘adat’ was outlawed it was still being practiced, likely due to attempts to reconstruct a State-regulated dialogue rather than showing disrespect. This example shows how forest laws transitioned from adat to normative regulation. This transition is occurring in the opposite direction to that in the above example. As above, an analytical framework based on mutual influence would not have been able to identify this interaction.

How the Malaysian Case Study can Contribute to Further Theory Building

The Malaysian case study also provides guidance on several theoretical points. First, it provides input in relation to the question of how we define law. Above, it was shown that perceiving law as a continuum allows non-State spheres to be given more attention and such attention is warranted because this sphere plays a large role in Malaysia. This continuum concept moves past the debates around the definition of law (positivism vs. natural law) and the different approaches to law (realist vs. formalist).

The positivist approach to defining law states that law is a set of rules and if the rules are properly formed then it is a valid law. The question of what the law *ought* to be is taken to be a separate issue. Natural law theorists on the other hand, use morality as a compass for what constitutes law. The Malaysian case study described above shows that neither approach is the sole answer. There are sources of law in Malaysia which are positivist in nature (such as official law) as well as laws that are based on morality, culture and religion (unofficial law and customary law). I have shown that both sources are used on the ground in Malaysia today and that this is a source of potential conflict. The fact that one source does not always 'trump' the other shows that the question is not whether the positivists or naturalists are correct, but rather in what situation will each one apply? The Malaysian case study shows that in the customary law and unofficial spheres, there is a strong slant towards perceiving law as from a 'natural' source, as syariah law exerts such a powerful influence and syariah law originates from religious beliefs. In the official law sphere, there is a slant towards perceiving law as 'positivist' although the slant is not that great as in general, syariah law exerts a larger influence in all areas of law.

A formalist approach to law is one where the law is applied strictly based on a set of parameters such that judges are not given authority to change the law, as this is seen to serve their own interests and undermine the rule of law. A legal realist approach believes that creativity in the interpretation of law is required to ensure that the law serves the public good and promotes justice. As above, the Malaysian case study shows that neither is the sole answer. There are sources of law which are formalist in nature (for example, syariah law applying to non Muslims) as well as examples that are more of a legal realist nature (for example, the mufti who ensure adherence to the law, although their subjective values often influence their actions).

Therefore, the Malaysian case study reinforces the idea that we are no longer concerned about the different theories of law and the conception that only one can apply. In such a pluralistic society like Malaysia, it makes sense that different pockets of society give rise to different types of law. This logically leads to the conclusion that one “definition” of law cannot apply in Malaysia and that the definition of law in general, not in relation to a particular country, cannot be answered by choosing either of two mutually exclusive fields. Conceptualizing ‘law’ as a spectrum considers the reality that in any society, different types of ‘laws’ can exist and allows law to be captured in its many different states as a constantly evolving and changing social practice. Further, what is law depends on the situation, the individuals involved and the culture in question. A definition of law is needed which accounts for all this. Perceiving law as a spectrum allows for these factors to be considered and for the variable (whether its positivist vs. naturalist, formalism vs. legal realism or State vs. non State) to be altered based on the situation.

Second, the Malaysian case study contributes to the question of how we can best capture the interaction of normative orders in theoretical constructs. It was suggested above that normative spheres interact in numerous ways such as through dialectic relationships or transitions. The Malaysian case example highlights the importance of identifying *different types* of interactions in our theories. This builds on previous work that focused on mutual relationships between different types of law and suggests that there are other types of relationships, such as transitions, which need to be considered if we are to properly analyse and understand how legal pluralism works in Malaysia.

Although the suggested analytical framework contributes to the theory on how to capture interactions of normative spheres, there is still room for improvement in this area. Further research is needed to identify other types of interactions besides the ones alluded to in this article. This could include three way, or other multiple, interactions. For example, a normative sphere that impacts on customary law could subsequently impact on official law. Another type of ‘interaction’ that could be considered is a ‘law’ which is characterized as both official and normative in nature and interact as such. Further research would then need to identify how these interactions work in Malaysia, any themes that arise and practical consequences. For example, take a law X, which has dialectic interactions with laws Y and Z and transitions into A and B over time. What does this practically mean for a citizen who is governed by law X? Does it matter what religion or ethnicity the citizen is? Future research also needs to focus on how human agency creates these changes, as human interactions are what cause law to change over time. The suggested

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analytical framework builds on previous theory in this area by emphasizing agency and the human experience in law and thus is more effective in explaining how interactions occur in Malaysia on the ground. This issue needs to be analysed so we can understand why, and how, different spheres change.

Finally, it should be mentioned that although legal pluralism contributes to explaining how plural legal systems operate in any given jurisdiction, it has not been as utilized as it could be for practical law reform purposes. This is due to many reasons, but an important one appears to be because the literature is focused on theoretical arguments. Instead of developing clear analytical and comparative frameworks for studying State and non State systems and how they interact, the field has been stalled by theoretical debates, thus reducing its practical relevance. It is accepted that a strong theoretical background and analytical framework is necessary for any theory to be applied; however, this theory must then be applied. This article has attempted to create such a theoretical framework, which can in the future be applied in a practical fashion to improve the situation in Malaysia. In other words, future research is needed on legal pluralism in Malaysia, but, once we have that information, it needs to be used to promote better ways for the interactions to work in practice. This must be acknowledged by officials and explained to citizens so that there is certainty and consistency in the application of the law in relation to how different spheres interact.

Law, Human Rights and the Rule of Law

Above it was shown that Malaysia has a plural legal system and there is a dynamic interaction between these legal spheres. Not only are there numerous normative orders governing citizens according to ethnicity and religion, but there are unique interactions between these normative orders with certain normative orders 'trumping' others in certain scenarios. Further, external factors such as Malaysia's political and religious history exert a large influence on how power relations between these normative orders are played out (Salim 2007). What is the consequence of this dynamic interaction? It appears that the result is that the Malaysian legal system is fragmented and this has consequences for the rule of law.

To understand Malaysian law one must understand the different normative orders that exist and to whom each one applies. Further, how these normative orders interact with each other, when one will trump the other and existing power relations must also be understood. This is because the normative order a citizen is

in and how that normative order interacts with other normative orders is more predictive of the outcome of a dispute than the ‘law on paper’. In practice, this means that similar cases may have different outcomes due to differences in religion or race as that affects which normative order a citizen is in and how that normative order will interact with other normative orders. Thus, rights are dependent on this legal plurality. This is problematic as the consequence of this fragmentation is distinguishing citizens by providing them different rights and protections. For example, women under syariah law are often *legally* prohibited from obtaining inheritance whereas non-Muslim women are granted access to inheritance. The fact that the protection of human rights differs so drastically across situations due to this legal plurality suggests that Malaysia is not a ‘thick’ rule of law country despite its Constitutional appearance. If citizens are not being treated equally, and the rights afforded to them are so intertwined with what normative order they are placed in and how it interacts with other normative orders, how can there be a substantive rule of law?

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